



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

B5

File: SRC 98 083 52774 Office: Texas Service Center

Date:

AUG 15 2000

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

Public Copy

IN BEHALF OF PETITIONER:

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:


This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b) (2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b) (2), as an alien of exceptional ability. The petitioner seeks employment as a research associate, specializing in transportation engineering, at the College of Engineering operated jointly by [REDACTED] and [REDACTED]

The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds an M.S. degree in Civil Engineering from FSU. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee

on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Along with documentation pertaining to his field of research, the petitioner submits several witness letters. Three of the witnesses are faculty members of [redacted] of Engineering. [redacted] states that the petitioner "set up a complicated, state-of-the-art triaxial resident modulus testing system in our laboratory and developed the test procedure" and that the petitioner "is essential to [six ongoing] research projects." Professor and department chairman [redacted] indicates that he was impressed with the petitioner's achievements as a master's student, and that the petitioner "plays a key role in the research projects . . . to

characterize the engineering properties of highway pavement materials." [REDACTED] states that the petitioner "has done a superb job" on projects which "will significantly improve the reliability of the pavement design and maintain the road system at a minimum cost and maximum efficiency."

[REDACTED] state soils materials engineer with the [REDACTED] was the project manager of a research project on which the petitioner worked. [REDACTED] describes the petitioner's duties:

His research includes set up and operation of a complex computer controlled closed loop hydraulic loading system for resilient modulus testing of pavement soils. He was also involved with another hydraulically operated computer controlled repetitive plate load testing system. Analysis and correlation of these two types of test results are essential for the selection of proper parameters for the AASHTO (American Association of State Highway Transportation Officials) Pavement Design Method. He did an excellent job in the testing, analysis and completion of the final research report. This is a significant contribution to the understanding of soil interaction behavior.

[REDACTED] vice president and pavement management engineer at [REDACTED] describes the petitioner's current work:

The objective of this project is to develop a prototype network-level structural evaluation procedure for use in the Pavement Management System (PMS) which is operated by the Florida Department of Transportation. The structural analysis procedure will enable the PMS system to operate in a more "proactive" mode by recognizing pavement deficiencies before they lead to a serious deterioration in condition (i.e. potholes and poor rideability). Substandard sections can then be identified and cost-effectively strengthened before, rather than after, the damage has occurred. [The petitioner] is responsible for analyzing the deflection data, and developing test protocols for network level testing and analysis, programming the structural analysis computer program, and writing the final report.

[REDACTED] assistant professor at [REDACTED] has known the petitioner since 1984. [REDACTED] offers no specific comment about the petitioner's work, offering only the general opinion that the petitioner "is an outstanding engineer who works in areas of infrastructures."

While the above witnesses indicate that the petitioner has played a significant role in his various projects, the initial submission contained no evidence that those projects are of greater importance than other ongoing civil engineering projects or that the

petitioner has had a greater impact in his field than others in his position.

The director requested further evidence to establish that the petitioner's work especially serves the national interest. The director noted that all of the initial witnesses have close ties to the petitioner, and asserted that the petitioner does not qualify for a waiver merely by virtue of the general importance of civil engineering. The director requested letters from "recognized major" entities demonstrating that the petitioner offers greater benefit to the U.S. than others in his field, as well as evidence that the petitioner "is an essential and indispensable element to the successful completion" of projects of major importance.

In response, counsel has cited Matter of New York State Dept. of Transportation, indicating that the petitioner's occupation has substantial intrinsic merit and national scope by virtue of its connection with the national transportation infrastructure. Counsel thus concludes that the petitioner's occupation serves the national interest.

Counsel then observes that the labor certification requirement requires that a given position be made available to "minimally qualified" U.S. workers. Counsel states "[c]ertainly, where our national interest is at risk, no employer should be compelled to participate in a labor market test which would favor a 'minimally qualified' American over a highly educated, experienced and talented foreign worker."

By the above reasoning, counsel essentially contends that if one satisfies the first two prongs of the test in Matter of New York State Dept. of Transportation, then one automatically satisfies the third prong of the test because "the national interest is at risk." Counsel's reasoning thus runs counter to a basic premise of Matter of New York State Dept. of Transportation, that an alien cannot qualify for a waiver based on the importance of his or her occupation.

Counsel contends "a labor certification in this instance would be impossible, as the position demands proprietary knowledge." It is clear, however, that the petitioner gained this "proprietary knowledge" while serving in his current position. Thus, the petitioner was plainly able to secure this employment without "proprietary knowledge."

Counsel states that the petitioner is involved with projects "at the cutting edge of transportation research" which the state of Florida does not dare entrust to minimally qualified workers. Counsel also contends that the Department of Labor would disregard the petitioner's specialized skills as being too restrictive. Counsel, in asserting that the petitioner learned his most valuable skills while employed on these projects, necessarily must concede that those skills were not necessary to secure such employment (as

the petitioner, when he began his work, did not yet possess those skills). Furthermore, the petitioner was a graduate student, holding not even a master's degree, when he began this work. Having put forth that the position itself teaches the necessary skills, it is disingenuous for counsel to argue that the position should not be made available to workers lacking those skills (as was the case with this petitioner).

The petitioner did not hold an advanced degree when he began the work in question. Therefore, the position obviously does not require an advanced degree, and the petitioner could not qualify under this classification if he were subject to the job offer requirement. It is not clear to what extent these circumstances have influenced the petitioner's decision to seek a national interest waiver.

Counsel asserts that the petitioner's work is especially important because "[h]e is in charge of several major transportation research projects . . . with a total combined value of over \$1 million dollars. He developed the testing system utilized in the laboratory, as well as the test procedures and supporting computer programs."

The record does not establish the significance of these facts. For example, the petitioner has not shown that the "total combined value" of a transportation engineer's projects rarely approaches \$1 million dollars. Documentation in the record indicates that, in 1997, President Clinton proposed a budget of \$175 billion dollars over the following six years for infrastructure improvement, an amount which does not include state and local expenditures. Some critics assailed the president's figure as too low, and the figure grew to \$217 billion. Given this massive amount of money (over \$36 billion per year in federal funds alone), the burden is on the petitioner to establish that engineers are only infrequently involved with projects totalling \$250,000 per year (most of the petitioner's projects have a projected four-year duration).

The record also does not indicate that the petitioner's testing procedures have had a significant impact not only on his individual project, but on the overall field of transportation engineering.

The petitioner submits new witness letters with his response to the director's request. Although the director had stated that the petition was weakened by the absence of independent letters of support, all of the initial witnesses having been directly involved in the petitioner's employment, the petitioner's response consists of further letters from an FSU professor and FDOT officials. Counsel, in the accompanying statement, has not directly addressed the director's concerns regarding petitions that rely entirely on the statements of co-workers and supervisors.

[REDACTED] identified above, states that the petitioner "is in charge of several major transportation research projects which are of vital importance and will have significant impact on the national level." [REDACTED] does not indicate how the petitioner has already had a national impact. Without a showing of prior impact, a claim of future impact is pure speculation. [REDACTED] repeats prior assertions regarding the exact nature of the petitioner's duties, and states that the petitioner "is recognized as an expert" in his field. Counsel repeats this assertion that the petitioner "is recognized as an expert," but neither counsel nor [REDACTED] specify by whom the petitioner is so recognized. The evidence of record indicates that serious attention to the petitioner's activities is largely limited to those who work with him.

[REDACTED] of [REDACTED] states that the petitioner "is presently in charge of several projects currently underway which will evaluate key features of pavement design to meet the needs of the State of Florida," and that "[a]n advanced transportation research center will be established at FSU." These assertions are future-based, involving a center which apparently does not yet exist, and analyses which have not yet been performed. Other FDOT officials concur that the petitioner plays an important role in the projects with which he is involved, and assert that his past work has "laid the groundwork" for further innovations. The officials fail to clearly explain how the petitioner's projects are of greater importance than countless other projects of this type. Furthermore, if the projects are indeed of paramount importance, it is not clear why they were initially entrusted to a first-year graduate student rather than a recognized engineer whose training was already complete. The petitioner's performance of these duties concomitant with his studies implies that the petitioner, at this point, is essentially continuing a student-level research project.

The director denied the petition, stating that the petitioner has set forth the self-contradictory assertion that the petitioner has skills which are of fundamental importance to his position, but which do not constitute minimal qualifications necessary for the job; in essence, that a minimally qualified worker would not possess the minimal qualifications for the job. The director also observed that the purpose of labor certification is not to ensure employment for the least qualified workers available, but to protect employment opportunities for U.S. workers in important positions as well as in more routine ones.

On appeal, the petitioner asserts that, unlike the civil engineer beneficiary in Matter of New York State Dept. of Transportation, the petitioner's duties involve research rather than "just following the current technology codes and manuals." The petitioner offers various arguments which imply that researchers, as a class, should be exempt from labor certification because they generate new knowledge rather than simply relying on existing information. This assertion echoes counsel's earlier claim that

some occupations inherently serve the national interest and therefore the waiver should be essentially automatic in those fields. This reasoning runs counter to Congressional intent in applying the job offer requirement to the underlying visa classification. Congress has amended the statute to allow blanket waivers for certain physicians (see the Nursing Relief for Disadvantaged Areas Act of 1999, P.L. 106-95). This amendment clarifies an important point: if blanket waivers were implicit in the original statute, then this amendment would have been unnecessary. Because Congress has to date created no blanket waiver for researchers, the Service is forced to presume that Congress intended for researchers, as a rule, to be subject to the job offer/labor certification requirement.

The remainder of the petitioner's statement on appeal consists primarily of excerpts from previous witness letters. These letters do not establish how the petitioner has already had a national impact on transportation engineering, or that the petitioner's work has attracted sustained interest outside of FAMU/FSU and parts of FDOT. The petitioner need not demonstrate that he is one of the most important or best known engineers in the entire country, but given his claim that his work since 1993 is of national importance, it is not unreasonable to expect some evidence of national-level impact beyond his employers and collaborators.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.